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No. 98-562

FILED
NOV 2 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

CITY OF GRENADA, MISSISSIPPI, ET AL.,

Appellants,

v.

LOUISE HUBBARD, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Mississippi

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MOTION TO DISMISS OR AFFIRM

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19 pp

QUESTIONS PRESENTED

1. Having failed to preclear under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a last-minute postponement of the 1996 city council elections, may the appellant city officials prevent remedial elections in 1998 from the latest precleared plan by claiming that they failed to comply with all procedural details of state law when that precleared plan was enacted in 1991, particularly where they have offered the District Court no other remedial proposal for holding elections in the wake of the 1996 postponement?

2. Should the District Court be reversed for granting summary judgment on the question of an appropriate remedy and for failing to hold an evidentiary hearing when the appellants have pointed to no evidence that they would have presented at such a hearing and have failed to explain how any such evidence could have made a difference to the District Court?

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v.

LOUISE HUBBARD, ET AL.,
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On Appeal from the
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MOTION TO DISMISS OR AFFIRM

The appellees respectfully request that this appeal be dismissed inasmuch as the appellants filed their jurisdictional statement three days late and omitted a required item from their notice of appeal, or alternatively that the judgment of the three-judge district court for the United States District Court for the Northern District of Mississippi be summarily affirmed inasmuch as the issues raised are so insubstantial as to require no further argument.[1]

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[1] The cover of the appellants' jurisdictional statement incorrectly identifies this case as an appeal from the *Southern* District of Mississippi, when in fact it is from the *Northern* District.

STATEMENT OF THE CASE

In 1996, the city council members of the City of Grenada, Mississippi, postponed their quadrenniel elections by obtaining a last-minute stay from the Supreme Court of Mississippi based upon city officials' own purported failure to follow state law some years earlier when passing the 1991 redistricting plan that was used in the 1992 elections.[2] The defendants readily have admitted that they should have, but never did, submit the postponement of the 1996 elections for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. *See, Hathorn v. Lovorn*, 457 U.S. 255, 266-267 and n. 16 (1982) (election law changes ordered by state courts must be precleared under Section 5). They stipulated in the District Court that Section 5 was violated by their failure to preclear the postponement of the 1996 elections, and they admit at page 10 of their Jurisdictional Statement to this Court that this is a "conceded violation" of Section 5. No elections have occurred since the 1996 postponement, and the voters of Grenada therefore have not had an opportunity to vote for city council members since 1992, six years ago.

In this appeal, the appellants seek to overturn the judgment of the three-judge District Court implementing a remedy for the Section 5 violation and ordering special elections for November 3, 1998, in conjunction with regularly scheduled elections for members of Congress and some state court judges. The appellants already have filed with this Court a motion to stay the District Court's order requiring special elections. In that motion, they raised the same grounds they raise in their jurisdictional statement. On September 25, 1998, this Court denied the motion for stay, No. A-234, and the elections will go forward on

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[2] Not long after the stay was entered, it was lifted, but the damage was done inasmuch as the stay prevented the elections from being held. J.S. App. A-20.

November 3.

These remedial elections, coming over two years after the unprecleared postponement of the 1996 elections, are the culmination of a lengthy process in the District Court. Ever since this litigation was filed in the wake of the 1996 Section 5 violation, the plaintiffs have asked that elections be ordered as soon as possible to fill the void created by the postponed 1996 elections, and also have asked that the elections be held from the ward lines of the 1991 city council plan, which is the last plan to be precleared and the last plan under which Grenada elections were held. On November 21, 1996, Judge L.T. Senter, Jr., of the United States District Court for the Northern District of Mississippi, sitting as a single-judge, declined the plaintiffs' request for the time being because the defendants recently had submitted a new plan for preclearance, "and that [preclearance] process could be concluded before any election might be held under the existing [1991] plan." J.S. App. A-27. In so doing, he noted that he had "strongly urged the city to take the necessary steps towards implementing a new ward plan or otherwise to move this matter toward the goal of conducting city elections," and that his decision was based on the presumption "that defendants will diligently comply with any additional instructions or requests which may be forthcoming from the Justice Department regarding any of the matters now pending before it." J.S. App. A-26, A-27. The new plan that the defendants had submitted for preclearance included a number of heavily-white areas that the City had annexed since 1991 as the black population of the pre-existing city boundaries was growing larger. But the annexations had not been precleared, and under this Court's decision in *Perkins v. Matthews*, 400 U.S. 379 (1971), the annexed areas could not be included in the electorate unless preclearance was obtained.

In September of 1997, concerned about the defendants' lack of progress in following through and obtaining preclearance,

Judge Senter ordered them to file a status report, which they did later that month. In it, they made it clear that -- despite Judge Senter's reliance on their prior submission of a new redistricting plan -- they would no longer stand on that plan or make further efforts to preclear it. Instead they said they were obtaining a special mid-term census and they would then develop and eventually submit for preclearance still another plan. *See*, J.S. App. A-22, A-23.

Noting that the defendants had not diligently complied with their duty to the Court and their duty under Section 5, and declining to permit them to delay city elections any longer, Judge Senter issued an order on November 21, 1997 -- a year after he had allowed the defendants more time to obtain preclearance of a new plan -- requiring special elections on February 3, 1998 from the 1991 plan. As Judge Senter noted, that plan had already "passed preclearance by the Justice Department and was not otherwise challenged as violative of either the Voting Rights Act or the United States Constitution." J.S. App. A-24.

The defendants moved for a stay pending appeal primarily on the ground that a single-judge did not have the power to adjudicate a Section 5 case, and that a three-judge court must be convened for an election to be ordered. On January 28, 1998, the Fifth Circuit granted the stay. On March 2, 1998, the Fifth Circuit remanded the case for the convening of a three-judge court. J.S. App. A-18.[3]

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[3] Judge Senter acted on the principle that once Section 5 liability is stipulated, as here, a single judge can grant relief and there is no need to convene a three-judge court. That position seemed to have some support in the case law. *See, Broussard v. Perez*, 572 F.2d 1113 (5th Cir. 1973). However, the actual text of the statute appears to require a three-judge court as long as a non-frivolous Section 5 claim is presented, and seems to make no exceptions. That apparently is the view taken by the Fifth Circuit in staying Judge Senter's order and remanding this case so a three-judge court could be

The three-judge court was convened, consisting of Judge Rhesa Barksdale of the Fifth Circuit, and Judge Senter and Judge Glen Davidson of the District Court. The plaintiffs then reiterated their request for elections to be held in the wake of the unprecleared 1996 postponement. They filed a summary judgment motion asking that the three-judge court order the elections in November of 1998 when congressional and certain state court judicial elections also will be held. They also asked that the elections be conducted using the ward lines from the 1991 plan.[4]

Once the motion was filed, the defendants requested an additional two weeks to respond beyond what is permitted by the local rules, and the District Court extended the deadline accordingly. But what the defendants did not disclose when requesting the extension, but what eventually became apparent, was that they spent the extended time period preparing a lengthy but belated preclearance submission of still another redistricting plan that had been adopted in late 1997. J.S. App. A-11, A-15. Once they finally did respond in the District Court, they contended that the District Court did not have the authority to order elections under the 1991 plan. But they offered no alternative -- except for more delay. J.S. App. A-16. Having already insured that they will remain in office at least two years beyond the expiration of their normal terms, the city council members wanted the District Court to allow them to stay in

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convened.

[4] In addition to the summary judgment motion, the plaintiffs also sought the same relief through a motion for preliminary injunction, submitted in the event the District Court felt it did not have sufficient time before the November elections to resolve the merits of the case by way of summary judgment. However, the District Court did have time, and it adjudicated the case and ordered the remedy by granting summary judgment.

office even longer without facing the voters.

But the District Court, acting unanimously on July 1, 1998, ordered that elections at last be held in the City of Grenada using the 1991 ward lines, with a candidate qualification deadline of September 8, 1998, an election on November 3, 1998, and a runoff election, if necessary, on November 17, 1998. J.S. App. A-6, A-10.

On July 28, 1998, 28 days after the District Court issued its order, the appellants filed their notice of appeal. Although the District Court's order scheduling special elections was issued on July 1, 1998, the appellants waited until August 31, 1998, to move in the District Court for a stay pending appeal. The District Court denied the motion for a stay the next day, September 1, 1998. The defendants then delayed another two weeks, waiting until September 15, 1998 to file their application for a stay with this Court, seven days after the candidate qualification deadline of September 8, 1998. As previously noted, this Court denied the stay on September 25, 1998, and the elections are going forward.

Also relevant is the fact that, on August 17, 1998, the United States Attorney General denied the defendants' request for preclearance of their latest plan and the annexations that it incorporated. In a lengthy and detailed letter, the Attorney General's designated representative concluded "that there is substantial direct and circumstantial evidence of discriminatory purpose with regard to the proposed changes," adding that "[t]he annexation and redistricting plan, in combination, would significantly reduce minority voting strength." According to the letter, the evidence "indicates that the submitted changes were undertaken with a purpose of stopping the growth of black voting strength in the city and, indeed, of reducing black voting strength back to and below the level that existed in 1990." (The letter is attached as Exhibit 1 to the appellees' response to the

appellants' stay application in this Court, No. A-234, and the quotes are from page 6 of the letter).

At this time, the City is making no effort to preclear any plan for city council elections, and has made no proposal to the District Court or this Court of an alternative plan under which elections can be held to fill the void created by the unprecleared stay of the 1996 elections.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED INASMUCH AS THE JURISDICTIONAL STATEMENT WAS FILED THREE DAYS LATE AND THE NOTICE OF APPEAL DOES NOT COMPLY WITH THE RULES OF THIS COURT.

The appellants filed their notice of appeal on July 28, 1998. Rule 18.3 of the Rules of this Court requires that the jurisdictional statement be filed not more than 60 days after the filing of the notice of appeal. The 60th day from July 28 fell on a Saturday, September 26, making the jurisdictional statement due Monday, September 28. But the appellants did not file it until October 1, 1998, three days after it was due.[5]

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[5] This is part of a consistent pattern of disregard for notions of timeliness displayed by the appellants in this case. The pattern includes, for example, waiting until nearly two months had passed before seeking a District Court stay of the elections ordered for this fall, and then waiting two weeks after the District Court denied the stay to seek a stay from this Court. *See also*, J.S. App. A-16 ("defendants have continued in their pattern of delay even after submission of the proposed plan"); J.S. App. A-10, A-11 ("defendants were continuing in a pattern of 'unnecessary delays that . . . prevented the citizens of the City of Grenada from exercising their right to vote in municipal elections'"); J.S. App. A-10 (referencing a "series of delays in fulfilling Justice Department requests for information"); J.S. App. A-11 and n. 3 (the City's most recent proposed plan -- later denied preclearance -- was

Also, the notice of appeal, reproduced in J.S. App. A-8, does not comply with Rule 18.1 of the Rules of this Court in that it does not "specify the statute or statutes under which the appeal is taken."

The appeal should be dismissed.

II. THE QUESTIONS PRESENTED ARE SO INSUBSTANTIAL AS TO REQUIRE NO FURTHER ARGUMENT, AND THE DISTRICT COURT'S JUDGMENT SHOULD BE SUMMARILY AFFIRMED.

With respect to the merits, the appellants' last argument, contained under heading III in their jurisdictional statement, will be addressed first here because it can be dispatched rather briefly. They complain about the granting of summary judgment without allowing an evidentiary hearing. But neither in this Court nor in the District Court have the appellants explained what evidence they would have presented if an evidentiary hearing were allowed, and what difference that evidence could have made to the District Court's ultimate decision.

Even if they had pointed to evidence which they would submit, the appellants only vaguely allude to District Court findings that they question, and it is clear those findings were not a dispositive part of the District Court's decisionmaking and were not essential to its judgment. The appellants complain about the "trial court's attempt to resolve issues of intent . . . and issues about the reasons for delays in the preclearance process." J.S. 19. But the District Court's comments about the appellants' intent clearly were not dispositive, but instead were followed by

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adopted "after several more delays" but was not submitted for preclearance until two months after it was approved; "[d]efendants have submitted no explanation for the additional two month delay").

a statement that the Court's rejection of the appellants' position was instead based upon this Court's case law. "*In the end*, though, the panel believes that defendants' arguments are misdirected and fail to take into account United States Supreme Court precedent. . . ." J.S. App. A-14 (emphasis added). And while the District Court obviously acted because preclearance had never been obtained of any new plan and because the City had taken no action to schedule elections, the District Court never suggested that the *reasons* for the City's delays would make any difference one way or the other.

As for the arguments under headings I and II in the jurisdictional statement, they are addressed collectively here because they are based upon the same contention. In essence, the appellants, who have conceded the existence of a Section 5 violation, complain about the District Court's choice of a remedy. Because of the equitable discretion afforded district courts in such a situation, the appellants must demonstrate an abuse of that discretion.

In attempting to do so, the appellants claim the preclearance of the 1991 plan should be nullified inasmuch as *they themselves* neglected to inform the United States Attorney General of noncompliance with certain state law procedures. These procedures specifically relate to public notice of the plan for three weeks in a newspaper and submission of the plan to the Governor for his pro forma signature. Because they purportedly did not inform the United States Attorney General of their noncompliance with these state law procedures, the appellants contend that the Attorney General's preclearance should be invalidated as a matter of federal law and that the District Court may not order elections under the 1991 plan.

Although claiming that the District Court should undo the preclearance because of a mistake they made, the appellants have *taken no action* to correct the purported mistake. They

have made no new submission to the Attorney General stating that this particular information was omitted from the prior submission, and they have made no attempt to supplement the prior submission with this information. If they truly were concerned with what they contend is the proper interpretation of Section 5, and if they truly believed the preclearance they previously obtained is subject to nullification, it seems they would have taken steps to correct the situation. But they have not done so. It appears they have not done so because they do not want to face the voters in a special election, and they do not want any further elections conducted from the 1991 ward lines. The appellants should not be allowed to block elections from a particular plan because of a mistake that they say *they made* when they put forth *no* effort to correct the mistake.

Moreover, as the District Court explained, "the validity of a redistricting plan under Section 5 and federal law does not depend on compliance with state law procedures." J.S. App. A-14, *citing, Young v. Fordice*, 117 S.Ct. 1228, 1235 (1997), *City of Lockhart v. United States*, 460 U.S. 125, 132 (1983), and *McDaniel v. Sanchez*, 452 U.S. 130, 152-153 (1981). The District Court said, "[u]nder these cases, defendants ommission did not affect the validity of the preclearance of the 1991 plan by the Justice Department." J.S. App. A-14.

In *Young*, this Court confirmed that a redistricting plan's status under Section 5 and under federal law does not depend on compliance with state law procedures:

> The appellants argue that the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never "in force or effect" [for Section 5 purposes]. We agree. A State, after all, might maintain in effect for many years a plan that technically, or in one respect or another, violated some provision of state law. Cf. *Perkins v. Matthews*, 400 U.S. 379, 394-395, 91

> S.Ct. 431, 440, 27 L.Ed.2d 476 (1971) (deeming ward system "*in fact* 'in force or effect'" and requiring change from wards to at-large elections to be precleared even though ward system was illegal and at-large elections were required under state law) (emphasis in original); *City of Lockhart v. United States*, 460 U.S. 125, 132-133, 103 S.Ct. 998, 1003-1004, 74 L.Ed.2d 863 (1983) (numbered-post election system was "in effect" although it may have been unauthorized by state law).

117 S.Ct. at 1235. As this Court said in *City of Lockhart*, Section 5 deals with the realities of the redistricting lines actually utilized "regardless of what state law might have required." 460 U.S. at 132. And in *McDaniel v. Sanchez*, 452 U.S. 130 (1981), this Court explained:

> The application of [Section 5] . . . is not dependent upon any showing that [a local governmental body] had authority under state law to enact the apportionment plan at issue. . . . The applicability of § 5 to specific remedial plans is a matter of federal law . . . .

Id. at 152-153.

Here, the 1991 plan was precleared by the Attorney General and utilized in the 1992 elections. The validity of that preclearance is not undermined by state law. The postponement of the 1996 elections violated Section 5 because the postponement itself was not precleared. It was the District Court's duty to implement a remedy to correct that Section 5 violation and make up for the long delay in the right of the citizens of the City of Grenada to vote for their city council members. The availability of the precleared 1991 plan to the District Court as a remedy is -- as the Supreme Court said in *McDaniel* -- governed by federal and not state law. Because the plan was precleared under federal law, this District Court

properly ordered it into place for elections to be held in the fall of 1998.[6]

Indeed, if the appellants' position here is accepted, it will provide a blueprint for local governmental officials to perpetuate their stays in office through manipulation of the preclearance process. All they need do is omit some technical state law detail from the redistricting and preclearance process, obtain Section 5 approval, and then years down the road, claim the preclearance is invalid as a matter of federal law and ask that elections be postponed indefinitely. As explained previously, this Court's decisions do not countenance such a bizarre scenario based on state law omissions, and the defendants' argument should not be permitted to prevail here.

Further, even if the appellants are correct and their

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[6] Contrary to the appellants' claims, this case is not effected by this Court's ruling in *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977). In *Warren County*, the three-judge district court ordered an election held under a plan that the Attorney General had specifically rejected under Section 5. The District Court here did not implement a plan specifically rejected under Section 5, but instead one that was actually precleared. Thus *Warren County* is not relevant. Similarly, this case is not effected by *McCain v. Lybrand*, 465 U.S. 236 (1984) or *Clark v. Roemer*, 500 U.S. 646 (1991), although the appellants suggest it is. Certainly, if the District Court were trying to utilize the 1991 plan with, for example, a majority vote requirement that had been adopted in 1988, never submitted, reenacted through the 1991 plan, and yet never identified in the 1991 Section 5 submission, *McCain* might control with respect to this hypothetical majority vote requirement. If the City had added a city council seat in 1988, never submitted it, included it in the 1991 plan, and yet never identified the addition of the new seat in the 1991 submission, *Clark* might control with respect to the uncleared seat. But here, the ward lines that the 1991 plan have been identified to the Attorney General and precleared. No uncleared pre-1991 changes have been reenacted. As illustrated by the principles and cases discussed in the text, the appellants' own state law omissions do not undermine the preclearance or give the appellants an excuse for further postponing the elections in this case.

omission of certain procedural information somehow should lead to the nullification of the overall preclearance of the 1991 plan, the District Court nevertheless would have the power to implement the 1991 ward *lines* as a court-ordered special election remedy, particularly under the unusual circumstances here. In preclearing the 1991 plan, the Attorney General necessarily examined the racial impact of the ward lines and concluded that the City had met its burden under Section 5 of proving they were tainted by neither discriminatory purpose nor discriminatory effect. There is nothing to suggest that this conclusion would be undermined by submission of the omitted procedural information.

In *Upham v. Seamon*, 456 U.S. 37 (1982), this Court held that district courts, when faced with the need to implement a court-ordered plan in the wake of a Section 5 violation, should modify the jurisdiction's unprecleared plan only to the extent necessary to cure the violation. "[T]he district court's modifications of a state plan [should be] limited to those necessary to cure any constitutional or statutory defect." *Id.* at 43. Here, even if the overall 1991 process was somehow effected by the defendants' state law omissions, *the 1991 lines themselves* -- and the Attorney General's determination of the absence of racial discrimination -- were not undermined by the omissions. *Upham* counsels in favor of the District Court accepting the 1991 lines as passed by the 1991 City Council and utilizing them as a special election remedy.[7]

Finally, it is important to note that the appellants have offered no alternative to the remedy imposed by the District Court except to suggest, at pages 19-20 of their jurisdictional

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[7] Certainly, it would not be proper to utilize the lines as part of a court-ordered plan if the Attorney General had concluded they were discriminatory and if no preclearance had been obtained. But that is not the case here.

statement, that "[t]he simplest and most clearly available relief . . . is an injunction against the unprecleared change." But in this case the unprecleared change -- the postponement of the 1996 elections -- has already been implemented, and an injunction against a postponement that occurred two years ago would be an exercise in futility. The remedy is to reschedule the election that never should have been postponed absent preclearance. That is what the District Court has done. Having suggested no alternative remedial plan, the appellants are in no position to claim that the District Court has abused its remedial discretion, and are in no position to obtain a reversal of the District Court's judgment.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully Submitted,

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